No. 90-143

In The
Supreme Court Of The United States

OCTOBER TERM, 1990

STATE OF CONNECTICUT,
JOHN F. DIGIOVANNI,
Petitioners,

v.

BRIAN K. DOEHR,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

Petitioners

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1. DECISIONS OF THE SUPREME COURT OF CONNECTICUT CONFLICT WITH THE SECOND CIRCUIT'S RULING IN THIS CASE.

Petitioners argue in their Petition that a conflict exists between the case under review, *Pinsky v. Duncan*, 898 F.2d 852 (2d Cir. 1990), and decisions of the Connecticut Supreme Court. They also argue that conflicts exist between *Pinsky* and decisions of other Courts of Appeals. Respondent claims that these conflicts do not exist. Respondent's position is untenable.

Despite respondent's denials (Brief in Opposition, pp. 4–5), the Connecticut Supreme Court has upheld the constitutionality of real estate attachments in Connecticut under Conn. Gen. Stat. § 52-278e, thereby creating a conflict with the Second Circuit's ruling in the present case.

In *Fermont Div. Dynamics Corp. of America v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979) the Connecticut Supreme Court found the *entire* statutory section constitutional, not just one or two subsections. This point was made by Chief Judge Burns in *Armstrong Cumming Architects v. Gruen*, Civ. No. B88-680 (EBB) (D.Conn. July 17, 1989)[1] as follows:

> Significantly, the *[Fermont]* court found all of § 52-278e constitutional, not just the one subsection directly before the court. The court expressly held that "[s]ection 52-278e exhibits all the saving characteristics that the law of procedural due process requires."

Id. at 7. *See also Shaumyan v. O'Neill*, 716 F.Supp. 65, 74 (D.Conn. 1989) (Judge Nevas).

In addition, all federal and state judges to consider the point have held that *Fermont* did, in fact, uphold the provision on real estate attachments contained in Conn. Gen. Stat. § 52-278e. Judge Newman so states in his dissent in the Second Circuit in the case at issue. 898 F.2d at 864–5, App. 31A.[2]

The Connecticut Supreme Court followed the *Fermont* holding in *Kukanskis v. Griffith*, 180 Conn. 501, 430 A.2d 21 (1980), a case arising under Conn. Gen. Stat. § 52-278e(a)(1). In *Glanz v. Testa*, 200 Conn. 406, 408, 409, 511 A.2d 341 (1986), a real estate attachment case, Justice Shea explains the *Fermont* holding's procedural safeguards:

> Under the General Statutes § 52-278e, the Court may award a prejudgment remedy, without a hearing or notice to the defendant, upon verification by oath of the plaintiff or some competent affiant that there is probable cause to sustain the validity of the plaintiff's claim. "The statute can be invoked only by a verified affidavit that contains factual, rather than merely conclusory, supporting allegations." *Fermont Division v. Smith*, 178 Conn. 393, 397, 423 A.2d 80 (1979); *see Kukanskis v. Griffith*, 180 Conn. 501, 505, 430 A.2d 21 (1980). Under this ex parte prejudgment remedy procedure, the court must make a determination of probable cause based solely on the facts contained in the affidavit before granting the attachment. In order to comport with federal constitutional due process requirements; *Fermont Division v. Smith*, supra, 397–98; the statute guarantees the defendant the opportunity for an immediate post-seizure hearing at which the prejudgment remedy will be dissolved unless the court determines "that there is probable cause to sustain the validity of the plaintiff's claim." General Statutes § 52-278e.

Clearly the *Glanz* court applied *Fermont* in the context of the constitutionality of § 52-278e(a)(1).

Of the utmost importance is the fact that Connecticut *Superior* Court Judges concluded that *Fermont* upheld § 52-278e(a)(1), making that statute constitutional in Connecticut even *after* the Second Circuit's contrary ruling in the present case. *See Soden v. Johnson*, D.N. CV83-0067730S (Stamford-Norwalk Sup. Ct., March 26, 1990) and *The Chase Manhattan Bank, N.A. v. Shea*, D.N. CV89-010397S (Stamford-Norwalk Sup. Ct., March 27, 1990) which held that

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[1] A copy of this opinion is set forth in the appendix to this reply brief. On April 9, 1990, Chief Judge Burns granted summary judgment for the debtor on the merits in this matter. She also vacated the attachment, citing the *Pinsky* decision, then binding on the District Court.

[2] "App." refers to the Appendix to the Petition for Certiorari.

Fermont had found § 52-278e(a)(1) constitutional and further that the Connecticut trial courts were bound by the Connecticut Supreme Court's ruling in *Fermont*, not by the Second Circuit's ruling in *Pinsky*.[3]

In this instance where the Second Circuit is effectively overruling a decision of the Connecticut Supreme Court, review in the Supreme Court appears essential. This review is another aspect of Federal Court deference to the enforcement of the orders and judgments of state courts found critical in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987); *see also Juidice v. Vail*, 430 U.S. 327, 336 n.12 (1977). ("[Abstention] stands in aid of the authority of the judicial system, so that its orders and judgments are not rendered nugatory.")

2. A CONFLICT EXISTS BETWEEN THE SECOND CIRCUIT'S RULING IN THE PRESENT CASE AND DECISIONS OF OTHER CIRCUITS.

Petitioners assert in their petition that a conflict exists between the Second Circuit opinion and decisions of other Circuits. Respondent has not shown otherwise. *Jonnet v. Sav. Bank of the City of New York*, 530 F.2d 1123 (3d Cir. 1976) sets forth at 1129 the requirements for constitutional *ex parte* attachments which virtually duplicate the Connecticut law.[4] The Court held the "extraordinary circumstances" of foreign attachment were not controlling. *Id.* 530 F.2d at 1123, n.13. Respondent's citation to *Hicks v. Feeney*, 850 F.2d 152 (3d Cir. 1988), a civil rights case involving wrongful commitment, where a discovery ruling was reviewed by the court, has no relevance to real estate attachments.

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[3] These opinions are set forth in the appendix to this reply brief.

[4] *Jonnet, supra*, 1130, mandates protection of the debtor by "bond or *otherwise*." As both the concurring Judge and dissenting Judge explained in *Pinsky*, the plaintiff's bond requirement is satisfied in Connecticut by the availability of a double damage action for vexatious litigation under Conn. Gen. Stat. § 52-568(a). 898 F.2d at 860, 864, App. 23A, 29A.

The Three-Judge Court in *Hutchinson v. Bank of North Carolina*, 392 F.Supp. 888 (M.D.N.C. 1975) upheld the constitutionality of the North Carolina *ex parte* real estate attachment statute, specifically noting that the "extraordinary circumstances" set forth in the statute were not the basis of its holding, 392 F.Supp. at 895, n.8. Respondent cites in reply *Fields v. Durham*, 856 F.2d 655 (4th Cir. 1988), an employment case not in point, in which a pre-termination hearing was not required.

The Fifth Circuit's holding in *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526 (5th Cir. 1978), conflicts with the Second Circuit's ruling. The *Johnson* Court struck down a Georgia attachment statute which failed to satisfy due process, but in doing so it set forth as a remedy each of the "saving characteristics" found in the Connecticut statute. The existence of an "extraordinary situation" was an *additional* means to protect the debtor, but was not mandated, if other safeguards were present. *Id.* at 535, n.16. Respondent's citation of an earlier Fifth Circuit case, *Turner v. Colonial Finance Corp.*, 467 F.2d 202 (5th Cir. 1972), a replevin case governed by *Fuentes v. Shevin*, 407 U.S. 67 (1972), hardly proves that there is no conflict between the rule of *Johnson* and the Second Circuit regarding real estate attachments.

Finally the Ninth Circuit in *Matter of Northwest Homes of Chehalis, Inc.*, 526 F.2d 505 (9th Cir. 1975) correctly sustained an *ex parte* real estate attachment, and this holding has not been abandoned in subsequent cases. Indeed *Chehalis* was recently relied upon to affirm a real estate attachment absent extraordinary circumstances in *Pay'n Save v. Eads*, 53 Wash. App. 443, 767 P.2d 592, 596 (1989). Respondent's cases involving disciplining prisoners, *Haygood v. Younger*, 769 F.2d 1350 (9th Cir. 1985), revoking a daycare license, *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375 (9th Cir. 1989), and barring transfer of property, *Stone v. Godbehere*, 894 F.2d 1131 (9th Cir. 1990) do not affect the *Chehalis* holding. *Stone* itself *sustains* an order without notice to the husband barring transfer of marital property, relying on *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

In short, respondent attempts to press upon this Court a simplistic view of the due process clause, relying as he does upon a variety of cases having no relevance to real estate attachments. The issues herein, to paraphrase Justice White in *Mitchell v. W.T. Grant Co., supra*, at 539, 540, are not "so clear as [respondent] would have it." In light of the conflicts between the Connecticut Supreme Court and the Second Circuit and between other Circuits and the Second Circuit, a writ of certiorari should be granted to review this facial attack on the Connecticut real estate attachment statute.

CONCLUSION

Petitioners respectfully submit that the Petition should be granted and a writ of certiorari should issue to review the judgment and opinion of the U.S. Court of Appeals for the Second Circuit.

Respectfully submitted.

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STATE OF CONNECTICUT:

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX TO
REPLY BRIEF OF PETITIONERS

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ARMSTRONG CUMMING ARCHITECTS Plaintiff	:	
	:	CIVIL NO.
v.	:	B88-680 (EBB)
	:	
MICHAEL S. GRUEN Defendant	:	

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this diversity action, plaintiff Armstrong Cumming Architects ["ACA"], a New York firm, seeks to recover fees stemming from services rendered to defendant Gruen for the redesign and remodeling of his home in Darien, Connecticut. ACA initially filed suit in state court, where it obtained a prejudgment remedy in the form of an attachment on Gruen's property.

Gruen removed the matter to this court, and now seeks to have the complaint dismissed in its entirety or a dismissal of plaintiff's second, third, and fourth affirmative defenses, based on his claim that plaintiff is not licensed to practice architecture in Connecticut. Defendant also seeks a vacatur of the attachment. contending that Connecticut's prejudgment remedy statute is unconstitutional. In the alternative, he seeks a reduction in the attachment because he disputes the amount that plaintiff claims is due.

Although the motion is captioned as a motion to dismiss, defendant notes in his affidavit that the motion is one for summary judgment, accompanied as it is by several exhibits. "If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule

56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 12(b), Fed. R. Civ. P.

LICENSURE

The parties agree that, as a firm, ACA is not licensed to practice architecture in Connecticut and that, as an individual, Cumming, a partner of ACA, is not licensed in Connecticut. The other partner of ACA, Armstrong, is so licensed. The plaintiff in this action is ACA, "a firm of architects and a general partnership." Complaint ¶ 1 (Nov. 2, 1988). Defendant argues that absent such a license, plaintiff's attempt to recover fees either on the contract or in quantum meruit is barred by Connecticut law. *See, e.g., Lapuk v. Blount*, 2 Conn. Cir. 271 (Conn. Cir. Ct. 1964); *Douglas v. Smulski*, 20 Conn. Supp. 236 (Ct. Com. Pl. 1957).

Plaintiff claims that it falls within one of three statutory exemptions from Connecticut's architectural licensing requirements. Plaintiff places reliance on the following provisions.

> The follow activities are exempted from the provisions of this chapter:
>
> (b) the construction or alteration of a residential building to provide dwelling space for not more than two families . . .;
>
> (d) the activities of employees of architects licensed in this state acting under the instructions, control or supervision of their employers;
>
> (h) the making of plans and specifications for or supervising the erection of any building containing less than five thousand square feet total area; the making of plans and specifications for or supervising the erection of any addition containing less than five thousand square feet total area to any building; the making of alterations to any existing buildings containing less than five thousand square feet total area; provided this subsection shall not be construed to exempt from the operation of the other provisions of this chapter alterations in buildings of more than five thousand square feet total area, involving the safety or stability of such buildings.

Conn. Gen. Stat. Ann. § 20-298 (1958 & Supp. 1989).

The court is unpersuaded that subsection (b) or (h) provides a basis for a license exemption in this case. Subsection (b) specifically exempts "construction or alteration," a phrase that plaintiff construes to include the drawing of designs. Plaintiff argues that "plans for a dwelling for two families or less do not have to be drawn by a licensed architect." Plaintiff's Response at 3 (Mar. 6, 1989). Defendant argues, and the court concurs, that this subsection refers to the *activity* of construction and alteration, not the designs necessary for such activity. "Had the legislature intended to include the latter activity within the meaning of § 20-298(b), it would have included words to that effect, just as it did in subdivision (c) ('the preparation of details and shop drawings') and subdivision (h) ('the making of plans and specifications')." Motion to Dismiss at 6 (Jan. 30, 1989). Indeed, unless subsection (b) is read as defendant suggests, there is no meaningful way to read it in conjunction with subsection (h), which provides limited exemptions for plans and specifications involving areas of less than five thousand square feet. It seems clear that drawing the plans necessary to alter a residence for two families or less where the alterations involve less than five thousand square feet does not require an architectural license. Conn. Gen. Stat. Ann. § 20-298(h). Plans for alterations in such a facility involving an area of more than five thousand square feet or, if the facility itself is greater than this size but the alterations are to a space less than five thousand square feet and they involve the "safety or stability" of the building, do require an architectural

license. *Id.* The court concludes, therefore, that the intent of subsection (b) is that, regardless of the size of the alteration, the entity actually performing construction or alterations need not be licensed as an architect.

Plaintiff's reliance on Conn. Gen. Stat. Ann. § 29-263 is unavailing. This provision merely imposes a requirement that *any* construction or alteration of a building requires a permit from the local building official, whose responsibilities are "to determine their compliance with the requirements of the state building code and, where applicable, the local fire marshal shall review such plans to determine their compliance the state fire safety code." *Id.* (1958 & Supp. 1989). The existence of a mandatory review process does not lead, as plaintiff argues, to the conclusion that an architect's license is unnecessary to draw the plans for constructing or altering a dwelling for two families or less. Indeed, based on the clear requirements contained in Conn. Gen. Stat. Ann. § 20-298(h), if the residence exceeds five thousand square feet, an architectural license would be required.

Plaintiff points out that the definition of the "practice of architecture" does not mention building activities. *See* Conn. Gen. Stat. Ann. § 20-288(3).[1] This definition strongly supports the defendant. As defined, the practice of architecture does not include the activity of construction or alteration, which dovetails with Conn. Gen. Stat. Ann. § 20-298(b). Subsection (b) provides that an architectural license is unnecessary for such activity. Moreover, the agreement submitted by ACA purporting to cover the relationship between ACA and Gruen does not indicate that ACA will be

[1] The statute provides that "[t]he 'practice of architecture' means rendering or offering to render of service by consultation, investigation, evaluations, preliminary studies, plans, specifications and coordination of structural factors concerning the aesthetic or structural design and contract administration of building construction or any other service in connection with the designing or contract administration of building construction located within the boundaries of this state . . . ." Conn. Gen. Stat. Ann. § 20-288(3) (1958 & Supp. 1989).

performing construction or alterations. *See* Plaintiff's Response (Mar. 6, 1989) (letter from Armstrong to Gruen, dated Jun. 30, 1987).

Subsection (d) may afford plaintiff some measure of protection from having its case dismissed. Based on the record as it currently exists, it is unclear in what capacity Cumming acted at the Gruen site.[2] The record contains no insights from Armstrong on this issue and neither side has offered legal authority on the question of whether a partner can be an employee of the partnership for limited purposes. This dispute is enough to defeat a summary judgment ruling at this point.

PREJUDGMENT REMEDY

Defendant makes a facial attack on the constitutionality of Connecticut's prejudgment remedy statute. *See* Conn. Gen. Stat. Ann. § 52-278a *et seq.* The alleged deficiencies include: (1) that the statute allows for an ex parte attachment of real estate without requiring prior notice and a hearing to the record owner; and (2) an ex parte attachment of real estate can occur without the movant posting a bond and there is no provision for the payment of attorney's fees. The court finds neither argument persuasive. Analysis of the prejudgment statute requires that the court look at the statute as a whole. Contrary to defendant's arguments, there is no mandatory checklist of procedural requirements, the absence of which renders the law unconstitutional on its fact.

The due process clause of the fourteenth amendment does not require predeprivation notice and a hearing, provided certain procedural safeguards exist. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 607, 610, 616–17 (1974). In that case, examples included judicial review of a sworn, factual submission before

[2] Cumming's affidavit is not signed, dated, or sworn to under oath and, therefore, it does not comply with Rule 56(e). It cannot serve as the basis for denying summary judgment.

a prejudgment order will issue, the opportunity for the debtor to post a bond as a substitute for the prejudgment order, and the right to an immediate postdeprivation hearing at which the creditor carries the burden of establishing grounds for the prejudgment remedy. *Id.* at 616–18. Under Connecticut law,

> in testing whether a [prejudgment remedy] procedure complies with the requirements of due process it will be examined in its entirety, and the lack of a provision for a prior hearing in and of itself will not be constitutionally fatal if other saving characteristics are present.

Roundhouse Constr. Corp. v. Telesco Masons Supplies Co., 168 Conn. 371, 380, *vacated*, 423 U.S. 809 (1975) (remanded to consider whether court's judgment based on state or federal constitutional grounds, or both), *aff'd on remand*, 170 Conn. 155 (earlier decision based on both federal and state constitutional grounds), *cert. denied*, 429 U.S. 889 (1976). When viewed in its entirety, it is clear that safeguards protect those subject to ex parte prejudgment remedies. The absence of a predeprivation hearing and the lack of a requirement of a bond are not facial infirmities in the statute. Defendant's claim that he enjoys a constitutional right to attorney's fees is unavailing.

Connecticut's Supreme Court ruled on the constitutionality of Conn. Gen. Stat. § 52-278e (governing ex parte attachments) in *Fermont Div. v. Smith*, 178 Conn. 393 (1979). Significantly, the court found all of § 52-278e constitutional, not just the one subsection directly before the court. The court expressly held that "[s]ection 52-278e exhibits all the saving characteristics that the law of procedural due process requires." *Id.* at 397–98. *See also Shaumyan v. O'Neill*, Civil No. N-87-463(AHN), slip op. at 40 (D. Conn. Jun. 27, 1989) ("the court concludes that section 52-278e(a)(1) [governing ex parte attachments of real estate], as written, comports with the requirements of fourteenth amendment due process."); *Pinsky v. Duncan*, Civil No. N-88-339(WWE), slip op. at 5 (D. Conn. Feb. 16, 1988) ("Viewed as a whole, [s]ection 52-278e(a)(1) comports with due process."); *Read v. Jacksen*, Civil No. B-85-85(RCZ), slip op. at 8 (D. Conn. Feb. 18, 1988) ("The facial constitutional validity of § 52-278e . . . stands beyond question . . . ."). This court joins the chorus in holding that Conn. Gen. Stat. § 52-278e is not facially unconstitutional.

Defendant also argues that plaintiff did not comply with the statute when it obtained the attachment on his property. Specifically, he challenges the affidavit presented to the judge issuing the prejudgment order. The statute requires that the party seeking an attachment, "upon verification by oath . . . of some competent affiant, [establish] that there is probable cause to sustain the validity of plaintiff's claim . . . ." Conn. Gen. Stat. § 52-278e(a). Here, Armstrong submitted an affidavit limited to a factual recitation of the events underlying the suit. *See* Defendant's Exhibit A. That plaintiff submitted no writing evidencing an alleged oral contract or that it did not discuss whether plaintiff was licensed does not detract from the probable cause determination in this case. The "specific factual showing of the nature of the claim," required by the statute, *see Kukanskis v. Griffith*, 180 Conn. 501, 505 (1980), exists in Armstrong's affidavit.

ATTACHMENT AMOUNT

Having held that the prejudgment remedy is not unconstitutional brings the court to defendant's challenge to the attachment amount in this case. He contends that the record will not support an attachment in the $30,000 to $40,000 range because the invoices yet to be honored by him only total $17,130.09. A letter from Armstrong, dated May 11, 1988, substantiates this claim. *See* Defendant's Reply Affidavit Exhibit I (Mar. 26, 1989). Neither this letter nor actual copies of the invoices were presented to the state court judge who originally entered the prejudgment remedy. This court agrees with the issuing judge with respect to the probable cause

determination but cannot agree, based on the record as it now exists, that the attachment amount is appropriate. Accordingly, the court orders that the attachment immediately be amended on the land records to reflect the $17,130.09 that the parties agree is due and outstanding. Any additional amounts that plaintiff seeks to recover clearly are open to dispute and are best left to a jury's determination.

CONCLUSION

The record must be more fully developed before the court can determine whether Conn. Gen. Stat. Ann. § 20-298(d) provides an exemption for the plaintiff's activities underlying this suit. The court holds that § 20-298 (b) and (h) do not provide licensing exemptions for the plaintiff based on the facts of this case. Accordingly, and upon the basis of a fuller record, plaintiff must show that it enjoys a legal and factual entitlement to the architectural licensing exemption contained in § 20-298(d) or its case will be dismissed. Connecticut's prejudgment remedy statute is not unconstitutional and, therefore, a vacatur of the attachment against the defendant's property is not appropriate. A reduction in the amount of the attachment based on the record as developed is appropriate, however, and such is ordered. The attachment shall be reduced to $17,130.09.

SO ORDERED.

/s/ Ellen B. Burns
ELLEN BREE BURNS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated at New Haven, Connecticut,
this 17th day of July, 1989.

D.N. CV83 0067730S

JOHN V. SODEN

V.

ROBERT E. JOHNSON, ET AL.

. . . . . .

D.N. CV89 0105334S

GREENWICH TILE

V.

MALLOY

. . . . . .

D.N. CV 89 0103308S

BARNETT BANK

V.

GABOR J. MERTL, ET AL.

. . . . . .

D.N. CV89 010533S

GREENWICH TILE

V.

MALLOY DEVELOPMENT

. . . . . .

D.N. CV89 0102621S

NEW CANAAN FOREIGN CAR

V.

G. BARRETT MONTGOMERY

SUPERIOR COURT

JUDICIAL DISTRICT
OF STAMFORD/
NORWALK
AT STAMFORD

MARCH 26, 1990

MEMORANDUM OF DECISION
RE: MOTION TO DISSOLVE EXISTING
PREJUDGMENT REAL ESTATE ATTACHMENTS

This memorandum of decision addresses issues raised in motions filed by various defendants with this court to dissolve prejudgment attachments issued against their real estate. The attachments had been obtained *ex parte*, pursuant to Conn. Gen. Stat. § 52-278e. Section 52-278e has subsequently and very recently been declared to be unconstitutional on its face by the Second Circuit Court of Appeals. The Second Circuit's opinion, announced in *Pinsky v. Duncan*, No. 89-7521 (2nd Cir. March 9, 1990), found that Connecticut's *ex parte* prejudgment real estate attachment statute was unconstitutional on its face in that it deprived a defendant of his right to a hearing prior to issuance of the attachment in violation of the due process clause of the 14th Amendment to the United States Constitution. Not surprisingly, the *Pinsky* decision has generated a great deal of controversy about the continued validity of existing prejudgment real estate attachments, and has given rise to a flurry of motions to dissolve such attachments. This memorandum will address such motions generally.

At the outset, this court acknowledges that it is bound by the decisional law of our Supreme Court. However, the court also recognizes that the *Pinsky* decision has the potential to create chaos within the state's business and legal communities. Therefore, the issues raised by the *Pinsky* decision in the motions before this court should be addressed.

While decisions of federal courts passing on federal constitutional questions should be afforded due respect by the state courts, the federal courts exercise no appellate court jurisdiction over state courts. *See United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970); *People v. Brisbon*, 129 Ill. 2d 200, 544 N.E. 2d 297, 135 Ill. Dec. 801 (Ill. 1989). Until the United States Supreme Court has spoken, state courts are not

precluded from exercising their own judgments on federal constitutional questions. *United States ex rel. Lawrence v. Woods*, 432 F.2d at 1075, quoting the Supreme Court of Iowa in *Iowa Nat'l. Bank v. Stewart*, 214 Iowa 1229, 232 N.W. 445, 454 (1930).

Our Supreme Court has spoken on the question of the constitutionality of Conn. Gen. Stat. § 52-278e and has determined that the statute meets the due process standards of the state and federal constitutions. *Fermont Division, Dynamics Corp. of America, Inc. v. Smith*, 178 Conn. 393, 397, 423 A.2d 80 (1979). Consequently, at this point in the process of judicial review of § 52-278e, this trial court is bound by the Connecticut Supreme Court's finding of constitutionality in *Fermont*. The opinions of the Supreme Court of Connecticut are binding upon the Superior Court and...until the court's decisions are changed, the Superior Court is bound to follow them. *Monies v. Hartford Hospital*, 26 Conn. Sup. 441, 442-43 (1966). Accordingly, as to the motions before this court which seek to vacate or dissolve existing prejudgment real estate attachments on the grounds of the Second Circuit Court of Appeals ruling in *Pinsky*, the motions are denied under *Fermont*.

However, even if this court were not bound by *Fermont*, and were to follow the *Pinsky* ruling, the question of whether *Pinsky* should be applied retroactively to invalidate all existing real estate attachments obtained through *ex parte* orders would still remain to be determined. In the interest of eliminating the speculation and uncertainty attendant to this issue, the following discussion is provided.

The United States Supreme Court considered the question of nonretroactive application of judicial decisions within a civil context in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L.E. 2d 296, 92 S. Ct 349 (1971). In *Chevron*, the court identified the three factors to be weighed in each case to determine whether a judicial decision should be applied retroactively or prospectively. *Id.* at 106. First, the decision must establish a new principle of law, either by overturning clear past precedent or by deciding an issue of first impression. *Id.* Second, the court must determine whether

retrospective application of the new rule will further or retard its operation in each case. *Id.* at 107. Finally, if retroactive application of the court's decision could produce substantial inequitable results, there is ample basis for avoiding the hardship by a holding of nonretroactivity. *Id.* at 107.

Turning to the issue raised here by retroactive application of the *Pinsky* ruling, namely the continued validity of existing *ex parte* real estate attachments obtained pursuant to § 52-278e, the court concludes the new rule would be applied prospectively only.

A weighing of the merits and demerits of retroactive application of the *Pinsky* rule to existing *ex parte* real estate attachments in Connecticut demonstrates that substantial inequitable results may occur if *Pinsky* is not limited to prospective force. The decision clearly overturns past legal precedents in this state and renders unlawful statutory procedures upon which Connecticut litigants have reasonably relied. Retroactive operation of the decision will not further the operation of the rule. On the contrary, retroactive application of *Pinsky* would create hardship and injustice to creditors who have lawfully obtained attachments to secure their interests. The disruptive effect of summary dissolution of existing real estate attachments would be far-reaching and potentially devastating to an orderly business community. Issues relating to the validity of title to real estate and priority of secured interests would be implicated.

For the foregoing reasons, this court would follow the reasoning of the Supreme Courts of Massachusetts and Rhode Island, as well as the District Court of Massachusetts when, upon invalidating similar prejudgment real estate attachment statutes, those courts expressly held their decisions to have prospective application only. *See Marran v. Gorman*, 359 A.2d 694 (1976); *Bay State Harness Horse Racing and Breeding Ass'n. v. PPG Industries, Inc.*,

365 F. Supp. 1299 (D. Mass. 1973); *McIntyre v. Associates Financial Services Co.*, Mass., 328 N.E. 2d 492 (1975).

/s/
CIOFFI, J.

Decision entered in accordance with the foregoing dated this 26th day of March, 1990.

John Morrow
Chief Clerk

All counsel notified. J. M.

D.N. CV89 010397 S (SUPERIOR COURT

THE CHASE MANHATTAN BANK, N.A. (STAMFORD-NORWALK (JUDICIAL DISTRICT

V. (AT STAMFORD

STEPHANIE W. SHEA (MARCH 27, 1990

MEMORANDUM OF DECISION

The plaintiff bank claims that the defendant Stephanie Shea defrauded it out of some $9,000,000 in connection with loans to several sulphur trading companies of which the defendant was president.

The action began when the plaintiff successfully obtained an *ex parte* attachment of Mrs. Shea's real estate in Darien. The defendant immediately moved to vacate the attachment; General Statutes § 52-278e(c); denying that she had committed any fraud on the plaintiff and claiming that Chase knew precisely what it was doing when it made the loans to the companies in question.

From the onset of the hearing to vacate the attachment, the defendant maintained that our Connecticut *ex parte* real estate attachment law violated the due process clause of the Fourteenth Amendment to the United States Constitution, and furthermore, that she has not been afforded "the immediate hearing" referred to in our statute.

Over the course of the last several months, a number of witnesses have testified as the plaintiff seeks to prove probable cause that it will prevail on the merits, thus warranting a continuation of the attachment. Counsel advise that in order to complete the hearing, only one deposition is required, as well as the completion of the testimony of a Michael Morgan, an expert witness called by the defendant.

The defendant now moves that the attachment be vacated immediately because of the decision of the United States Court of Appeals for the Second Circuit in *Pinsky v. Duncan*, No. 89-7521 (March 9, 1990).

The plaintiff argues that this court is not bound by the *Pinsky* decision and cites a number of cases to that effect. I concur completely and add some relatively recent cases not referred to by plaintiff, all of which stand for the proposition that, unlike the United States Supreme Court, other federal courts are not in the appellate process with respect to state judiciaries. Examples of these recent cases are: *People v. Dale*, 545 N.E. 2d 521, 537 (Ill. App. 1 Dist. 1989); *People v. DelVecchio*, 544 N.E. 2d 297 (1989); *Watson v. Symons Corp.*, 121 F.R.D. 351, 354 (N.D., Ill. 1988) (state courts need not apply the law of the federal district in which they sit on questions of federal law).

Although it is very clear that our courts are not bound by this decision of the federal appeals court, until and unless the Supreme Court affirms *Pinsky*, there is nevertheless a practical problem in that anyone against whom an *ex parte* real estate attachment is granted may go into the federal system and receive an order directing the attaching party to release the attachment. This would be a valid order because the federal court would have jurisdiction over each party, and its order would be binding on all other courts, subject only to the appellate process. *See United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (1970). It may well be, therefore, that from a practical standpoint it makes more sense not to issue *ex parte* real estate attachments unless and until the United States Supreme Court reverses *Pinsky* or our Connecticut legislature changes our statute.

In any event, this issue need not be reached with respect to the pending motion to vacate the attachment on Mrs. Shea's home because I believe that the *Pinsky* decision is prospective only, not retroactive. The leading case on nonretroactivity is *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct.

349, 30 L.Ed. 2d 296 (1971). This decision states that before a decision can be deemed to be nonretrospective, three standards should be examined. The first is whether the decision reverses established law. This would certainly be true in this case because our attachment statute, Connecticut General Statute § 52-278e, was upheld in *Fermont Div. v. Smith*, 178 Conn. 393, 423 A.2d 80 (1979).

The second criterion is "whether retrospective operation will further or retard its operation." *Chevron Oil*, 404 U.S. at 107. The third factor asks whether retrospective application of the decision "could produce substantial inequitable results." *Id.* Applying those standards to the Connecticut statute and *Pinsky*, it would seem clear that retrospective application of *Pinsky* will not further its operation. To the contrary, retroactive application could cause substantial, inequitable results by creating uncertainty within the Connecticut business community which has relied upon the lawfulness of the state's statutory procedures.

Based on the standards of *Chevron Oil*, I believe that the *Pinsky* decision is prospective only and hence I decline to grant the defendant's motion to vacate the attachment. Furthermore, the defendant is being afforded the very hearing that the *Pinsky* decision indicates the due process clause requires, a hearing in which the plaintiff has the burden of proving probable cause. Hence, the hearing should continue as planned.

SO ORDERED.

Dated at Stamford, Connecticut this twenty-seventh day of March 1990.

/s/ W.B. Lewis
LEWIS, J.

Decision entered in accordance with the foregoing
March 27, 1990.

[illegible], Asst. Clerk

All Counsel Notified March 27, 1990.